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Securing the UK's position as a global disputes hub: Best practice lessons between Singapore and the UK

Report of the All-Party Parliamentary Group for Alternative Dispute Resolution

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Foreword

The UK is a global superpower in the resolution of disputes. From our rich mercantile history as an international trading nation to the credibility and reliability of English common law, a kaleidoscopic range of factors combine to make the UK the preferred destination for parties seeking to bring their disagreements to an acceptable conclusion. From arbitration to mediation and other forms of alternative dispute resolution (ADR), the UK's pre-eminence provides an invaluable underpinning to our role as a dynamic, outward-looking global country.

To take the example of International Arbitration, research shows that London remains the pre-eminent global leader, with 64% of respondents listing London as a preferred arbitral seat[1]. Significantly, 55% of those surveyed also believe Brexit will have no impact on London's attractiveness as an arbitral seat. This seems a reasonable view given that Brexit will not directly impact either the integrity of English law or the UK's position as a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Furthermore, regardless of Brexit, London fares well when measured against the Chartered Institute of Arbitrators Centenary Principles for an effective arbitral seat[2]. As for mediation, this is becoming an ever more mainstream part of the UK's disputes resolution landscape and has been a feature of the litigation process since the introduction of the 1999 Civil Procedural Rules, designed to encourage parties to mediate and granting courts the power to impose sanctions where mediation is unreasonably refused.

As members of the All-Party Parliamentary Group for Alternative Dispute Resolution, we and our colleagues are delighted by the UK's continued leadership in this field and feel we should be proud of our undoubted competitive edge on the global stage. Nevertheless, in a period of rapid economic, social and political change across the world there is no room for complacency; if the UK is to consolidate and thrive as a disputes hub into the future there must be active engagement with the challenges and opportunities we face. The purpose of this report is to identify those challenges and opportunities and set out how we think UK policymakers, dispute bodies and business leaders should respond.

In August 2019, we travelled to Singapore on a week-long fact-finding visit organised by the Chartered Institute of Arbitrators. During our time there, we met with key figures from government, the judiciary, business and institutional providers of ADR and arbitration to learn more about how the country has established itself as a leading global disputes hub. The discussions we had were invaluable in terms of deepening our understanding of what exactly constitutes an effective system of dispute avoidance and resolution, and the vital roles that governmental, judicial and commercial decision-makers must play to bring it about. The insights we were granted form the core basis for this report.

It is clear to us that the UK can learn much from Singapore's experience over recent decades. From adopting a 'whole of government' policy for disputes policy to efforts to boost the status of mediation as a means for settling international commercial disputes, there are several elements of the Singaporean approach which we think the UK should emulate and, where necessary, adapt and modify. Even more importantly, we believe there are steps both countries should take to further improve their dispute regimes, particularly in terms of conflict avoidance and improving the diversity of training and education for dispute resolvers in a way that broadens the pool of expertise from which dispute practitioners can be drawn. We hope that our recommendations can be adopted by decision-makers in both the UK and Singapore, and look forward to working with both governments on how they can be implemented.

As a group committed to promoting all forms of ADR, we believe that the development of effective dispute resolution mechanisms across the world is an unalloyed good, and just as it is encouraging to see the UK maintaining its position as the world's leading disputes hub, it was inspiring to see the incredible success Singapore has had in establishing its own sector over recent decades. The proliferation of alternatives to litigation is positive for businesses, governments and court systems in all countries; we do not see this as a zero-sum game. Instead, our intention for this report is to share best-practice for the benefit of all.

John Howell MP (Chair, APPG for ADR)
John Spellar MP (Vice-Chair, APPG for ADR)

[1] White & Case, International Arbitration Survey: The Evolution of International Arbitration, 2018
[2] CIArb, Centenary Principles, 2015

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1. Executive Summary

The UK's status as the world's leading international disputes hub is integral to its position as a global, outward-looking trading nation. Across arbitration, mediation and other forms of Alternative Dispute Resolution (ADR), there is ample evidence to prove we are the preferred destination for parties in conflict, particularly when it comes to international commercial disputes. The UK remains a global disputes powerhouse.

However, this position cannot be taken for granted. There are real changes taking place within the global economy with implications for where parties will choose to resolve their disputes. The eastward shift of the world's economic and political centre of gravity is already impacting the size of the UK's lead over competitors in Hong Kong and Singapore. Furthermore, the needs of parties in dispute are rapidly changing. From increasing interest in mediation as a means of settling commercial disputes to a greater emphasis on conflict avoidance techniques to prevent disputes crystallising in the first place, the way in which disputes are handled is in flux. The UK must adapt to and lead these changes if we are to remain at the cutting edge of the prevention, management and resolution of disputes.

The APPG for ADR believes strongly that success in this endeavor requires concerted effort from dispute practitioners, our leading institutions, the business sector and the wider legal community. Above all, there is a significant role for government to play in convening these different groups and taking pro-active decisions to shape the UK disputes framework. This report sets out our policy proposals across the following areas:

- **Governmental coordination**
- **Promoting mediation**
- **Meeting the needs of end users**
- **Embedding conflict avoidance mechanisms**
- **The education and training of non-lawyers**

1.1 Recommendations

1. The UK Government should adopt a 'whole of government' approach to policies relating to the avoidance, management and resolution of disputes, including the appointment of a dedicated 'Minister for Commercial Disputes'.

2. The UK Government should sign the Singapore Mediation Convention as an integral part of its efforts to encourage the use of mediation for resolving commercial disputes.

3. Policymakers in both Singapore and the UK should work in collaboration with both the commercial sector and dispute resolution professionals to encourage a culture of innovation that meets the needs of business in the post-Brexit world.

4. The UK and Singapore should adopt Conflict Avoidance Boards as standard practice on all complex public procurement projects.

5. The UK and Singapore Governments should work with professional bodies and training providers to increase the number of non-lawyers practicing dispute avoidance and resolution.

2. Introduction: UK and Singapore dispute resolution in context

2.1 Dispute Resolution in the UK and Singapore

The UK is the world's pre-eminent hub for dispute resolution, particularly when it comes to international commercial arbitration. The 2018 White & Case International Arbitration Survey showed that London remains the arbitral seat of choice for most parties, with 64% of respondents selecting it as their preferred option. The London Court of International Arbitration (LCIA) also remains the second most preferred arbitral institution, with 51% of respondents selecting it (behind the International Chamber of Commerce with 71%). 55% of those surveyed believe this pre-eminence will be unaffected by Brexit.

Whilst precise figures are impossible to obtain, the indications are that there's been substantial growth in the UK commercial mediation market as well. Survey evidence shows that in the 12 months to July 2018 there were 12,000 commercial mediations in the UK (not including small claims mediations), an increase of 20% over 2016[3]. The same survey also indicates a very healthy success rate for mediation, with 89% of surveyed cases resulting in a settlement, up from 86% in 2016.

Over the last two decades, Singapore has emerged as one of the foremost dispute hubs in the world. Between 2006 and 2016, the number of new cases handled annually by the Singapore International Arbitration Centre (SIAC) increased nearly fourfold from 90 to 343[4]. International arbitrations seated in Singapore are governed by the International

Arbitration Act (1994). In 2019, the Singapore Law Ministry proposed the following amendments to the IAA:

1. Introduction of a default nominating procedure for arbitrators in multi-party arbitrations

2. Requirement for arbitrator to decide on jurisdiction at the preliminary stage if requested by all parties

3. Recognizing tribunal's and High Court's power to enforce confidentiality obligations

4. Provision for parties to opt-in to appellate procedure on questions of law

5. Exclusion/limitation of set-aside grounds under the Model Law and IAA

6. Empowerment of the court to order costs following set aside

Mediation in Singapore can be traced back to the 1990s. Singapore Chief Justice Yong Pung How instigated a major court modernization process and established the Court Mediation Centre in 1995. In 2013, Chief Justice Sundaresh Menon setup a working group aimed at establishing Singapore as a leader in international commercial mediation; the group's recommendation for the creation of a dedicated international mediation institution resulted in the establishment of the Singapore International Mediation Centre (SIMC) in 2014. Mediation in Singapore has been on the increase ever since, a trend encapsulated in the signing of the Singapore Mediation Convention in August 2019.

[3] Centre for Effective Dispute Resolution, Mediation Audit, 2018 https://www.cedr.com/docslib/The_Eighth_Mediation_Audit_2018.pdf (accessed 24th October 2019)

[4] SIAC Statistics: http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics (accessed 24th October 2019)

Table 2.1

Dispute regimes in the UK and Singapore		
	UK	**Singapore**
Party to the New York Arbitration Convention?	Yes	Yes
Party to the Singapore Mediation Convention?	No	Yes
Governing arbitration framework	Arbitration Act (1996)	Arbitration Act (2001) - domestic International Arbitration Act (1994) – international
Governing mediation framework	EU Mediation Directive (2011) – *cross-border mediation*	Mediation Act (2017) Singapore Mediation Convention (2019) – signed August 2019
Leading arbitral institution	London Court of International Arbitration (LCIA)	Singapore International Arbitration Centre (SIAC)
Leading mediation institution	Centre for Effective Dispute Resolution (CEDR)	Singapore International Mediation Centre (SIMC)

2.2 Recent Developments

In the UK, there has been a renewed interest in recent years in how London's status as the world's leading centre for disputes can be defended. In some respects, this can be traced back to the decision to leave the European Union in June 2016, and the related concern that the UK's standing on the international stage must be preserved if the country is to thrive post-Brexit.

However, in another sense Brexit has only crystallized the sector's thinking about broader and deeper shifts in the global economic system. For the time being, the UK's position as the global leader for dispute resolution appears secure, as attested by the 64% of respondents to the White & Case survey choosing London as their preferred arbitral seat. Nonetheless, there is no doubt the UK's lead over other jurisdictions has narrowed as other dispute hubs grow in stature, particularly in Asia.

This recognition that London needs to adapt to the 'Easternisation' of the global economy was one of the motivations behind the inaugural 'London International Disputes Week' held in May 2019. Across 4 days, the week included discussion sessions, keynote speeches and panel debates on a range of topics, from the implications of AI for the way disputes are handled to in-depth analyses of trends in shipping, financial services and competition law. In the week prior to the conference, the APPG held an evidence session on "London's Future as an International Dispute Resolution Hub".

3. Coordination and Evolution: the 'whole of government' approach to disputes policy

To be effective, any system for the avoidance, management and resolution of disputes must be comprehensive, joined-up and fully embedded in commercial processes. As such, Government policy in this area needs to be cross-departmental and draw from resources and expertise from across the government machinery. Specifically, policy strategies on commercial dispute resolution should be led by a Minister for Commercial Disputes within the Department for Business, Energy and Industrial Strategy (BEIS) as an integral part of the Government's Industrial Strategy. Disputes policy cannot be an isolated element within the 'Professional Services' Sector Deal – rather it must underpin all aspects of the Industrial Strategy as a whole, from public sector procurement and regulatory reform to supply chain management and small business policy. In this way Government can drive a genuine paradigm shift in the way disputes are dealt with.

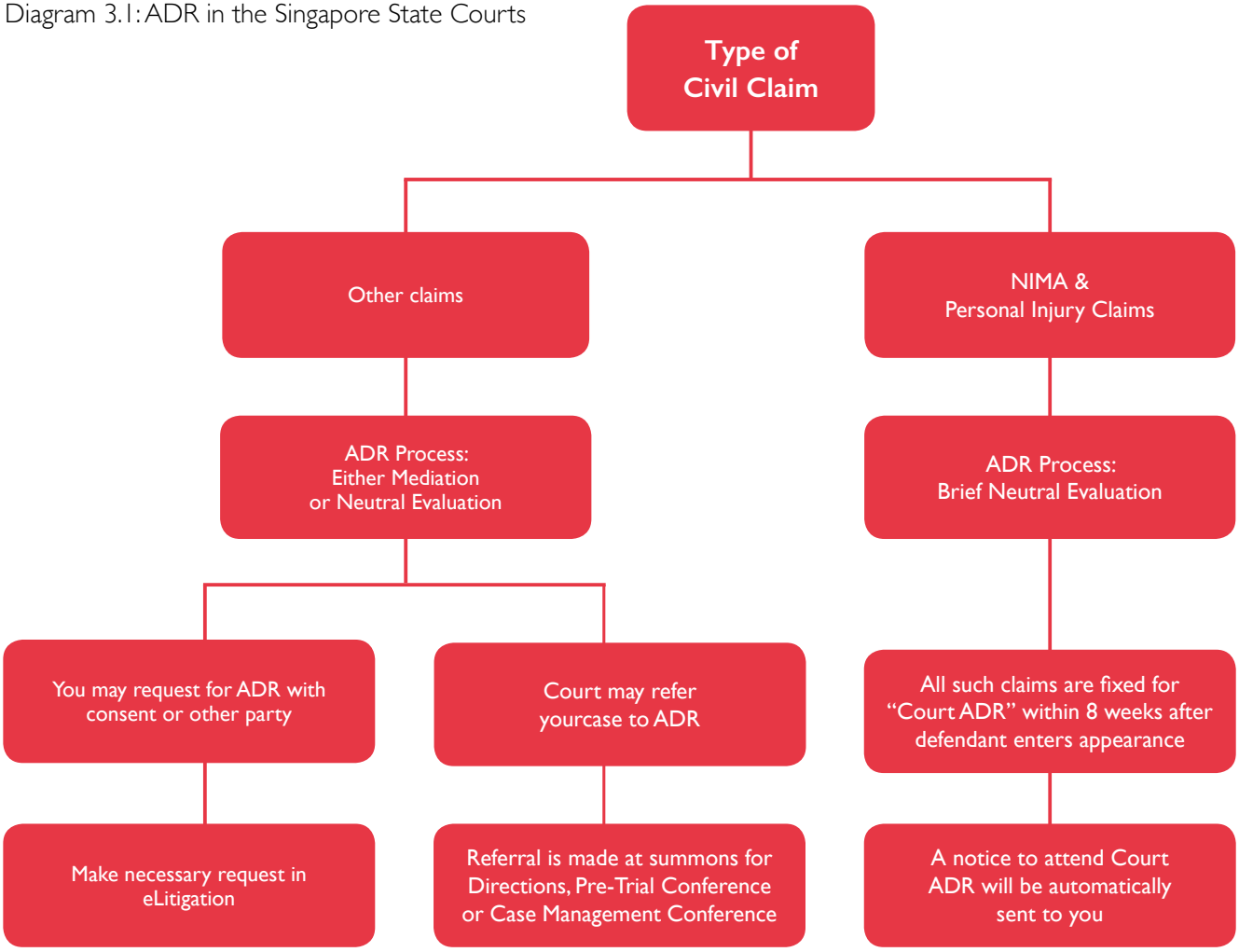
3.1 The Singapore approach

From the outset of our time in Singapore, we heard from various parties about the important role played by government in establishing the country as a leading disputes hub. Specifically, we were told that government provides invaluable holistic and long-term strategic thinking that enables the sector to transcend more transitory short-term concerns. Linked to this is the significance of government funding for the sector, and the readiness of the government to back-up its aspirations for the sector – both domestically and internationally – with concrete political action.

The growth of Singapore's ADR sector has been closely interlinked with the liberalization of the country's financial sector, and its subsequent emergence as an international commercial sector[5]. Until Singapore acceded to the New York Convention in 1986, arbitration did not really feature in Singapore. Likewise, mediation was not widely used until the 1990s. However, since that time both mechanisms have emerged as preferred methods for resolving disputes and concerted government action has played a key role in this process.

Firstly, the passing of the International Arbitration Act (1994) and the Arbitration Act (2001) effectively embedded arbitration for both cross-border and domestic commercial disputes. In conjunction with this, in the 1990s the then Chief Justice undertook a comprehensive modernization process to better integrate ADR with the court system. In 1995, the Court Mediation Centre was established (which later become the State Court Centre for Dispute Resolution). The State Courts now encourage all potential litigants to consider ADR as a first port of call and have robust processes for diverting cases away from litigation and towards ADR at every possible stage of proceedings (see diagram 3.1). This level of integration is invaluable in 'normalising' ADR as a means for resolving disputes and relieving the court system of undue pressure.

Diagram 3.1: ADR in the Singapore State Courts



[5] Singapore Law Watch, https://www.singaporelawwatch.sg/About-Singapore-Law/Arbitration-ADR (accessed 28th November 2019)

The holistic approach to ADR in Singapore's court system is mirrored by the actions taken by the government across the board. One of the most tangible examples of this has been the development of Maxwell Chambers as Singapore's dedicated integrated ADR centre with seed capital provided by the Singapore Government. Once again, this was not an isolated decision, but was the result of a holistic, forward-looking strategy to give real heft to the country's disputes sector.

Strikingly, the policy-making process out of which the Maxwell Chambers initiative emerged demonstrates that the value of establishing Singapore as a regional and global disputes centre was not seen as solely a legal matter, but as a vital pillar of economic development. In 2002, the Economic Review Committee (ERC) was established to "fundamentally remake" the Singapore economy to better compete in the context of knowledge-based globalization. The Legal Services Working Group of the Committee emphasized the need for "good infrastructure and facilities" to establish Singapore as a centre for dispute resolution, and in 2005 the Ministry of Law initiated proceedings to develop an integrated dispute resolution complex. Maxwell Chambers opened in 2010 and in August 2019 tripled in size – it now hosts 11 international institutions and 20 disputes chambers. It is an integral part of Singapore's – and the world's – disputes ecosystem.

Singapore's willingness to dedicate political capital to ADR initiatives is also evident in its approach to mediation over the last 20 years. The experience here not only demonstrates the importance of concerted, long-term government action, but also of the value in having a dedicated, highly credible public figure to drive the agenda forward. Chief Justice Sundaresh Menon is hugely respected worldwide for his contributions to the ADR sector, and through his influence mediation has taken great strides forward, both in Singapore and internationally. Shortly after his appointment as Chief Justice, Menon established a working group with the specific objective of making Singapore a leader in commercial mediation. As a result, the Singapore International Mediation Centre was established in 2014 and in 2019 Singapore led the way in the signing of the Singapore Mediation Convention.

3.2 Policy making in the UK

In contrast to Singapore, arbitration in the UK is the product of many centuries of evolution; nonetheless there are parallels in the way that the development of the sector in the two countries has shadowed their emergence as global economic centres. In the UK, arbitration really took root in the 17th century as merchants sought cheaper and speedier alternatives to litigation. The first Arbitration Statute (the Locke Act) was adopted in 1698 and provided the first legal basis "for Promoting of Trade and for rending the Awards of Arbitrators the more effectual in all Cases"[6] . Whilst arbitration emerged as an alternative to the courts, Stavros Brekoulakis has characterised the relationship between arbitration and English Law as one of "cautious trust" and argues that the relative absence of antagonism between the English courts and arbitration has been positive for the development of UK arbitration[7].

This extensive historical background is a source of tremendous strength, but it also creates problems. As the birthplace of arbitration and a variety of ADR mechanisms, the UK can draw on a rich ecosystem of institutions, legal norms, expertise and cultural practices that are amenable to the resolution of disputes without recourse to the courts. On the other hand, the very embeddedness of arbitration and ADR in the UK can undermine attempts to formulate a pro-active government policy.

Within the court system, efforts have been made in recent years to better integrate ADR mechanisms so that more cases can be resolved without litigation. In his 2016 Civil Courts Structure Review, Lord Justice Briggs recommended the establishment of an Online Court to deal with lower value civil money claims[8]. Following the publication of this report, CIArb produced its own White Paper setting out how ADR could be integrated with the Online Court so that cases are automatically directed to ADR at the triage stages. This is an exciting proposal and could potentially change the way that alternatives to court are perceived by the public. However, to date the online money claims service merely refers to "considering other options", and requests that applicants "consider mediation". There is no directory of mediation services, and other forms of ADR

[6] Kateryna Honcharenko, *Roebuck Lecture 2019: Has Arbitration Always Been Favoured in England?*, 11th July 2019: http://arbitrationblog.kluwerarbitration.com/2019/07/11/roebuck-lecture-2019-has-arbitration-always-been-favoured-in-england/ (accessed 28th November 2019)

[7] Stavros Brekoulakis, *Roebuck Lecture 2019: The Unwavering Policy Favouring Arbitration under English Law*, 13th June 2019: https://www.ciarb.org/news/roebuck-lecture-2019/ (accessed 28th November 2019)

[8] Lord Justice Briggs, *Civil Courts Structure Review*, July 2016

(such as Early Neutral Evaluation) are absent. The Singaporean framework for directing cases to mediation almost as a matter of course is not replicated in the UK.

The example of the online court illustrates some of the problems with ADR policy in the UK. Whilst we have a rich and long-established culture of resolving disputes outside of court, the infrastructural framework has in some areas failed to keep pace. There is a clear understanding in government of the value of ADR, but insufficient resources have been dedicated to integrating ADR into civil justice processes. In the context of Ministry of Justice budget cuts of around 40% over the last decade, this is perhaps unsurprising. However, this can result in short-term thinking that is at odds with the strategic approach found in Singapore. It also suffers from being compartmentalised – improving ADR processes should be understood as an integral part of the UK's industrial strategy, not just a matter for HM Courts and Tribunal Service (HMCTS).

The lack of a concerted UK policy towards dispute avoidance and resolution is also evident in other areas. In May 2019, the UK held the first ever London International Disputes Week, partly to rectify the perceived absence of a single voice promoting the UK as a disputes hub on the world stage. To some extent this absence can be attributed to the fact that the UK remains the world leader for disputes, and it would be completely wrong to characterize the current situation as one of decline. However, it would be a mistake to allow this status to breed complacency. If the UK is to retain its world-leading status, concerted engagement is required.

3.3 Recommendations

Overall, the UK has an impressively robust legislative and policy framework for disputes. The 1996 Arbitration Act is respected worldwide. Our history as the birthplace of arbitration and other forms of ADR means we have a rich culture of non-court dispute settlement, and we remain the pre-eminent global disputes hub. Nonetheless, we would undoubtedly benefit from a more purposive, consistent and strategic policy approach to how the UK disputes sector is nurtured, both domestically and internationally, and in this respect, we can learn a lot from the approach taken by Singapore in recent decades.

We have identified 4 specific actions the Government can take to improve policymaking in this area:

1. Pro-active and sustained engagement with the Judicial ADR Liaison Committee

The establishment of the Judicial ADR Liaison Committee in September 2019 is a positive statement of intent, and the fact its Terms of Reference include a responsibility to "promote the greater use of alternative dispute resolution (ADR), especially through case management in the civil courts and by encouraging greater public awareness of ADR" is to be welcomed. Policymakers should pro-actively engage with this committee over the long-term. When the committee puts forward policy proposals, these should be properly resourced and enacted in full.

2. Appointment of a 'Minister for Commercial Disputes'

Within BEIS, a leading Minister should be given explicit and dedicated responsibility for the development of policies to improve the ways businesses can avoid, manage and settle disputes. This need not supplant existing policy portfolios – instead this figure will be a focal point and provide greater momentum for policy initiatives in this area.

3. 'Commercial dispute avoidance and resolution' to be a central pillar of the Industrial Strategy

Dispute avoidance, management and resolution is not merely an aspect of legal services or a matter for the courts. It is imperative for the health and vibrancy of the UK's economy, international trading position and business sectors. It should be given greater prominence within the industrial strategy.

4. A clear and coherent voice promoting the UK as a disputes hub on the world stage

The UK's leading status as a global disputes hub should not be taken for granted. In recent years, leading figures from the UK disputes sector have explored the potential of establishing a dedicated body to promote the UK in this area. Government departments – particularly BEIS and the Department for International Trade – should fully support these efforts and leverage their influence worldwide to promote the UK's prowess as a disputes centre. They should also fully support the London International Disputes Week initiative as a way of highlighting our strengths on the world stage.

4. Mediation: a coming of age?

4.1 Consensus over adversarialism

The essence of an effective ADR regime is that it offers a comprehensive suite of different options for parties in dispute. For this reason, different dispute resolution mechanisms have developed, each offering different advantages and catering to different needs. Arbitration can offer parties finality and clarity – the fundamental point is that the Arbitrator makes an award that is then binding on both parties (and crucially, enforceable in the courts under the New York Convention). However, arbitration has come under increasing criticism for too closely emulating the litigation process it was meant to provide an alternative to. Arbitration is still an inherently adversarial process, and once engaged, the parties have no control over the outcome which is imposed upon them.

For these reasons, mediation is an increasingly attractive option for businesses seeking to resolve their disputes. It promotes constructive engagement rather than adversarialism and is often praised by parties for allowing them to retain a sense of control over the process. Typically, mediation has been a far less 'legalised' process than arbitration. As mediators don't make binding 'awards' in the way an arbitral tribunal does, the parties also retain 'ownership' of the settlement they come to, which can reduce the risk of one party feeling they have somehow 'lost'. This is invaluable for preserving relationships.

4.2 Mediation in Singapore: pro-active promotion

The Singaporean government has actively sought to embed mediation as an integral part of the dispute resolution landscape. Going back to the mid-90s, a series of measures have been taken to add rigor to the disputes system and incorporate mediation. In 1995, the Court Mediation Centre was established, and mechanisms have been introduced to incentivize parties to use mediation rather than relying on litigation. These mechanisms have included pre-action protocols and penalties for declining to accept an opposing party's offer to mediate. Therefore, whilst mediation is not generally mandatory, it is viewed as a default option to attempt before other avenues can be explored.

As a result of this 'mediation-first' mindset, disputes that are less than £60,000 will almost always go through mediation. Again, whilst mediation is not mandatory it is so strongly encouraged that it's almost always pursued, and the settlement rate in such cases is approximately 71%. In disputes worth more than £60,000, it is up to the parties whether they want to mediate. Crucially, the Judiciary has played a pro-active role in encouraging mediation, and judges have become very proficient in understanding the value of mediation and knowing how and when to direct parties towards mediation.

This commitment to mediation last year culminated in Singapore launching the new Mediation Convention, which to date has been signed by 46 countries including India and the United States. The stated purpose of the Convention is to provide a framework for ensuring the enforceability of mediated settlements. Previously, mechanisms such as Arb-Med-Arb were used to ensure enforceability (this involved 'converting' a mediated settlement into an arbitral award enforceable under the New York Convention), and the SMC is intended to overcome this obstacle.

However, the ambitions for the Convention go far beyond enforceability (which in any case is less necessary than in arbitration), and it is not viewed by proponents as merely a technical solution to a technical problem. Rather, it is viewed as a 'rallying point' for highlighting the value of mediation and equipping those countries that sign up to it with the impetus to drive through a wider reform programme. For example, the decision of the Indian Government to sign the Convention last year was accompanied by extensive domestic reforms to strengthen mediation (indeed making it mandatory in certain cases).

> While the focus of the SCM is on enforceability, its impact is wider – it is also a rallying point for mediation worldwide
>
> George Lim (Chairman, Singapore International Mediation Centre)

These are the grounds on which the UK should also sign up to the Convention. Through UNCITRAL, UK officials played a key role in developing the Convention itself, and whilst it has to date been deemed unnecessary (given the UK doesn't face issues with the enforceability of mediated settlements), there will be value in the UK joining a global movement to strengthen mediation as a standard way of resolving commercial disputes.

4.3 Recommendations

The UK can learn from Singapore's pro-active approach to the promotion of mediation. We recommend that the UK government adopts the following recommendations:

1. Sign the Singapore Mediation Convention

The Singapore Mediation Convention is an important vehicle for promoting the wider use of mediation, and the UK can be a valuable partner in driving this agenda forward.

2. Train a wider pool of expert mediators

Mediation is strengthened by drawing on a wide range of experts from across different commercial sectors. The government should work with professional bodies to drive up the number of qualified and accredited mediators.

3. Equip the Judiciary with the knowledge and skills to actively promote and encourage mediation

One of the reasons for the success of mediation in Singapore has been the role of the Judiciary in directing parties towards it as a means of resolving their dispute. The UK should equip its judges to play a similar role in promoting mediation over litigation where appropriate.

5. Innovation and agility: building a disputes framework that meets the needs of business in a post-Brexit world

An effective system for avoiding, managing and resolving disputes is a vital underpinning for a healthy and vibrant business sector. This is especially true for the UK as we negotiate new relationships after leaving the EU. From major multinationals to small and medium-sized enterprises (SMEs), conflict avoidance, ADR and arbitration can play an important role in minimizing the impact of costly and time-consuming disputes and equip businesses with the tools they need to build constructive commercial relationships. Now more than ever, the disputes profession needs to be a true enabler of commerce and trade.

ADR and arbitration emerged to meet the needs of businesses who sought to avoid the costly and sometimes destructive impact of court processes. Ever since its inception, the profession has thrived when it has adapted to changing commercial imperatives, whether through the introduction of adjudication for construction disputes or the development of Conflict Avoidance Boards (CABs). For the sector to thrive both in the UK and beyond, this culture of innovation must be retained, and every effort must be made to improve access to ADR mechanisms for all businesses. Furthermore, the mechanisms themselves must continually adapt to the changing needs of business, not the other way around. This must take precedent over any commitment to a particular process or 'way of doing things'.

5.1 Meeting the needs of business

Disputes and their associated costs are a significant burden on businesses in the UK, particularly when it comes to SMEs. A 2016 report from the Federation of Small Businesses estimated that small enterprises pay around £12.4 billion each year in dealing with legal disputes[9]. For larger corporates, as has been mentioned previously London remains the pre-eminent destination for international arbitration, with businesses particularly attracted by the UK's reputation as a stable environment rooted in the rule of law. The UK's long history as a centre for dispute resolution is an obvious comparative advantage in this regard, as well as London's rich mercantile history and multi-layered ecosystem of world-class business services.

In terms of the mechanisms available to parties seeking to resolve their disputes, the UK has often led in terms of innovation. Alongside our well-established arbitration tradition and the highly-regarded framework set by the 1996 Arbitration Act (England & Wales), mediation, early neutral evaluation and other forms of ADR are also used widely. Innovation is particularly noticeable in the construction sector, where the introduction of adjudication in the 1996 Construction Act has proven highly effective in providing interim-binding decisions that allow projects to continue and relationships to be preserved. This is particularly important in construction and infrastructure, where delays can be especially costly.

The overall picture is therefore one of a vibrant and healthy disputes sector that is generally very good at meeting the needs of business. However, it is vital that this strong tradition doesn't generate complacency in planning for the future. As we negotiate our post-Brexit trading relationships and seek a new commercial role in the world, it is more important than ever that we have a disputes framework that is dynamic, flexible and responsive to evolving business needs. In particular, the UK needs to draw on the same impulse of innovation and creativity that driven part responses to commercial imperatives such as the emergence of adjudication. Crucially, dispute avoidance, management and resolution mechanisms need to continue to offer genuine alternatives to court – they must not become imitators of the litigation process.

[9] Federation of Small Businesses, *Tied Up: Unravelling the Dispute Resolution Process for Small Firms*, 2016

5.2 Findings from business engagement in Singapore

During their visit to Singapore, we met with a wide range of representative from the business community, including the British Chambers of Commerce (BritCham) and a roundtable hosted by the British High Commission with representatives of major corporates. The focus was on hearing directly from the end users of dispute management and resolution services and not merely the practitioners themselves.

The picture that emerged was of a business community whose priority is to get any dispute resolved in the simplest most efficient way possible. Within these parameters, a particular premium is attached to both speed and the maintenance of commercial relationships to the greatest possible extent. It was generally felt that litigation is not an optimum means of achieving this, and that the parties often lose control of the process once litigation proceedings commence.

The individuals we engaged with emphasized their desire to be offered a range of different mechanisms which are comprehensible to them and which cater to the various categories of dispute they may face. There was a consensus in favour of a suite of options that is ever deeper and ever wider, with processes that aren't prescriptive but instead are flexible enough to meet the requirements of the parties and the specifics of the dispute.

"A suite of options ever deeper and ever wider…"

Regarding Singapore's own status, there was clear agreement that policymakers have been very successful in establishing the country as a leading global disputes hub in the last 2-3 decades. Its international image as a stable and certain business environment was specifically cited as an important consideration attracting parties to manage and resolve disputes there. This was a point that applies equally well to London and the UK, although it should be noted that the sector professionals we engaged with in Singapore emphasized that the UK cannot take this status for granted – it is a reputation that must be continually earned.

On mediation, there was a palpable admiration for the way Singaporean policymakers proactively engage to intervene and press parties towards the mediation process. Mediation was viewed in an almost entirely positive light, and those we spoke to said that it offers much greater scope than both litigation and arbitration for creative and constructive resolutions to be reached. Whilst the point was made that mediation is dependent on genuine engagement from the parties and that including mediation in a contract can sometimes run against this, the net effect of the government's proactive approach was judged to be positive.

One area of mediation where it was felt improvement was needed in Singapore was in the training and accreditation of a sufficient cohort of specialist mediators with sector-specific expertise. Many of the disputes the businesses we spoke to faced were highly complex and required extensive background knowledge of the industry in question. Neutrals can only be effective in this context if they are rooted in the dynamics of that industry – and in mediation the sense was that this sectoral expertise is more important than extensive legal training.

When asked what specific actions they would like to see from government in both Singapore and the UK, the business representatives highlighted the following:

- Greater activism from the Judiciary to push parties towards mediation
- More effective use of public procurement to promote mediation (specifically through the inclusion of mandatory mediation clauses in government contracts)
- Investment in conflict avoidance, including the promotion of Conflict Avoidance Boards (CABs)
- The UK government could do more to link UK business in Singapore and the wider APAC region with the Industrial Strategy

5.3 Recommendations

Non-court dispute resolution mechanisms emerged to provide more efficient ways for businesses to deal with conflict. If the UK (and indeed Singapore) is to retain its leading position as a global disputes hub, this commercial sensitivity must be maintained and enhanced. In practice, this requires a perpetual culture of business engagement to ensure the range of options available to parties in dispute keep pace with the changing needs of business, and the nature of the disputes they may find themselves in. This is particularly true for the UK as it establishes a renewed role in the world following its departure from the EU.

There are a number of practical steps that policymakers can take to foster such a culture. We have identified 3 specific points, all within the theme of collaborating closely with business groups to foster a culture of innovation and agility.

1. Continual development and promotion of an 'ever wider and ever deeper' range of dispute mechanisms

The essence of effective dispute avoidance and resolution is choice. For ADR to be effective, it must offer a genuine alternative to litigation, and parties must be empowered to choose a mechanism that best addresses their needs, whether they prioritize cost, speed or the preservation of commercial relationships. The UK has a strong track record in this area (for example with the development of adjudication). The emphasis must always be on the needs of the parties (the 'function' of dispute resolution) rather than on any individual formal process (the 'form').

2. Use the Government's own procurement policies to promote and develop the use of ADR

The power of the public purse gives government unique leverage to shape commercial relationships. This power should be used to propagate the use of ADR by ensuring all public contracts have robust dispute resolution clauses in place. Government procurement frameworks should require contractors to adopt effective processes for the avoidance, management and resolution of disputes.

3. Establish clear channels of engagement with the business community when developing disputes policies

The ultimate success of any policy relating to dispute management rests on comprehensive engagement with the end users of dispute resolution services. Whether through formal consultations, the establishment of liaison committees or direct engagement with business representatives, both the UK and Singapore should work in close collaboration with the commercial sector.

6. Conflict Avoidance: stopping disputes before they start

Our objective as an APPG is to identify, develop and promote innovative methods of preventing, managing and resolving disputes. Whilst ADR mechanisms such as mediation and arbitration are important options for resolving a dispute once it has crystallised, it is clearly much more beneficial if that crystallization can be avoided in the first place. Costly and time-consuming disputes can be prevented, projects can continue unimpeded, and most importantly healthy, constructive commercial relationships can be preserved.

For these reasons, in recent years there has been an increasing emphasis on conflict avoidance as distinct from dispute resolution. Specifically, the concept of the Conflict Avoidance Board (CAB) is gaining traction, and decision makers are placing more emphasis on how commercial relationships can be structured from beginning to end in a way that embeds both the cultural ethic and the formal mechanisms required to anticipate, identify and prevent potential conflicts before they escalate into fully-fledged disputes. Policymakers should be an integral part of this paradigm shift, and work to embed conflict avoidance across their contracts, public procurement procedures and major projects.

6.1 History and advantages of CABs

Many innovative mechanisms for dealing with disputes have been pioneered within the construction industry, and CABs are no exception. They originated in the Dispute Board (DB) model which emerged in the United States in the 1970s as a response to excessive litigation costs and the inherently unpredictable nature of large-scale, complex projects. Such Dispute Boards are either standing (in that they were established at the inception of a project on an ongoing basis) or ad hoc (being assembled in response to specific instances of disputes). The two principle types of each are Dispute Resolution Boards which issue non-binding decisions, and Dispute Adjudication Boards which issue binding decisions. The key principle is that such Boards can be tailored to the specific requirements of a particular project – their function takes precedence over their form.

CABs have already been used to great effect in the UK and around the world. Notable projects which have benefitted from CABs include the London Olympics, the Copenhagen Metro, and Hong Kong International Airport. They typically consist of between one to three neutrals and exist throughout the duration of a contract. In the first instance they seek to prevent disputes from arising by encouraging and facilitating informal discussions. In the event a dispute does crystallize the Board can give enforceable decisions.

Whereas DBs offer only limited conflict avoidance functions, CABs build upon the principle by seeking to prevent disputes from arising in the first place.

Early Identification: CABs can identify potential disputes and take steps to deal with them before they interfere with the progress of the project.

Efficiency: they ease the burden on internal resources for both parties, allowing the delivery of a project while issues are dealt with by the external independent panel.

Flexibility: the parties have a great deal of latitude in terms of how a CAB is constituted and the basis on which they want it to operate. The number of members can be tailored to the size of the project, ensuing cost effectiveness and efficiency.

Buy-in: by allowing parties to have a say in their constitution, CABs will typically enjoy widespread buy-in. This is reflected in the extremely low levels of decisions that go on to be challenged by parties. This makes it easier for parties to move past disputes and continue working relationships.

Expertise: panel members generally have a professional background in the sector and therefore can understand the complexities of issues that can arise.

Confidentiality: any disputes that arise will remain confidential.

Cost-effectiveness: a standing Board typically constitutes only 0.005%-0.25% of the total cost of the project, whilst arbitration costs can vary from 3-37% of the value in dispute. CABs also prevent further costs from incurring through snagging and delays.

6.2 CABs in the UK and Singapore

There are clear benefits to be gained through both the UK and Singapore making greater use of conflict avoidance mechanisms, particularly on complex projects. As has been mentioned, there are already strong examples of CABs being used in infrastructure projects. In the UK a CAB was notably successful in the delivery of the Olympic Park in the run-up to 2012. In Singapore, we found through our engagement during the visit that formal conflict avoidance mechanisms are less common. We heard how major international infrastructure projects were invariably conducted within the International Federation of Consulting Engineers (FIDIC) framework – and therefore subject to the 2017 Dispute Avoidance and Adjudication Board provisions – but that more local projects tended to be resistant to the concept of CABs. That said, there are signs in Singapore government policy of greater engagement with more formal mechanisms. For example, the Singapore Infrastructure Dispute-Management Protocol (SIDP) 2018 provides a framework for Dispute Boards. However, the focus of these boards is on dispute management rather than direct conflict avoidance.

In both countries, CABs can play an important role in major infrastructure projects. Singapore is renowned for its world-call infrastructure, which is one of the many factors that make it such an attractive commercial hub. CABs can provide a way of developing and maintaining this infrastructure more effectively. In the UK, the commitment of the current government to 'level-up' the regions through greater investment in infrastructure – particularly HS2 – can be delivered upon most effectively by using specialised CABs.

However, CABs are applicable far beyond construction and infrastructure. They can play an important role in any specialised complex projects where the avoidance of delays and the preservation of the commercial relationship are paramount. From IT to defence contracting, CABs can act as an insurance policy for public projects, resulting in more value for money for the public purse and preventing the cost and time overruns that all too often are synonymous such processes. For this to happen, policymakers should incorporate CABs into their procurement frameworks. Additionally, it is imperative that policymakers recognise that the value of CABs lies in their ability to mobilise sector experts with the knowledge and skills to anticipate potential conflicts. As such, they should work with professional bodies to ensure a sufficient supply of trained CAB members are available across different industries, from construction and infrastructure to IT.

6.3 Recommendations

Prevention is better than cure, and effective conflict avoidance strategies can be incredibly beneficial for commercial relationships. Specifically, CABs offer an effective mechanism for anticipating and preventing disputes on complex projects by mobilising sector-specific expertise and experience. Both the UK and Singapore should make greater use of them.

1. Incorporate CABs as standard practice on all major public projects

In the UK, the government should build on the proven success of CABs on projects such as the 2012 Olympics and incorporate them as standard practice on all complex public projects, including HS2. In Singapore, the government should build on the 2018 SIDP framework by giving greater prominence to avoidance rather than just management and resolution.

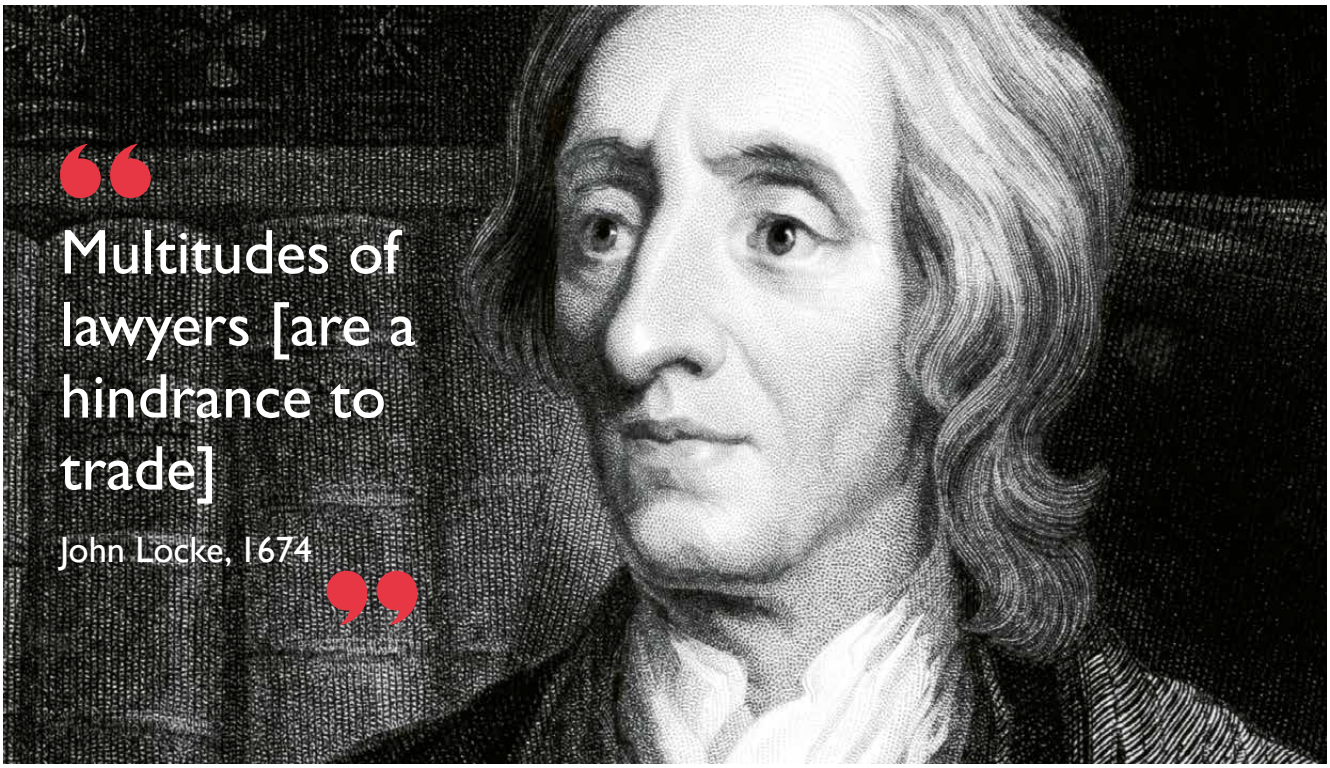
2. Establish CABs on other complex projects beyond construction and infrastructure

Whilst CABs emerged in the context of the particular needs of construction and infrastructure projects, the principles they apply are equally relevant to other sectors. From IT to defence contracting, CABs offer a way of managing complexity and guarding against costly disputes and delays. The UK government should include CABs within the Outsourcing Playbook and include a 'Conflict Avoidance' schedule within the Cabinet Office Model Services Contract to mirror the existing 'Dispute Resolution' schedule.

3. Promote conflict avoidance throughout the contractual process and boost the number of eligible experts

Whilst in Singapore we were told of the importance of constructing CABs properly during the contract drafting stage (right from the beginning of the commercial relationship). It is this that gives the Boards credibility and neutrality and ensures the most effective composition. Both the UK and Singapore government should work with professional bodies to train sector experts, and draw upon recommended clauses to establish CABs as a standard part of the contract drafting process.

7. Beyond lawyers: a holistic approach to disputes



7.1 The ‘legalization’ of arbitration

It is important to remember that one of the earliest drivers of the development of arbitration was the desire to avoid legal entanglements. Indeed John Locke, the author of England’s first ever Arbitration Statute listed “multitudes of lawyers” as one of the main impediments to the smooth operation of trade. One of the main attractions of resolving disputes through ADR and arbitration rather than thrashing them out in court is the perception that relationships can be better preserved in this way. To take arbitration, 97% of respondents to the 2018 International Arbitration Survey said this was their preferred means for resolving a dispute (either as a stand-alone process or in conjunction with other forms of ADR). The appetite for court on the other hand was negligible, with only 1% saying they would prefer to resolve a dispute through cross-border litigation[10].

However, there is growing concern that arbitration is becoming increasingly ‘legalized’, in a way that undermines some of arbitration’s unique advantages – namely that it can be cheaper, quicker and less adversarial than litigation. There are different reasons for this. Many high value disputes in international arbitration are becoming exceptionally large-scale, with vast numbers of participants on both sides. Additionally, as the stakes get ever higher in high-value and complex commercial arbitrations, party demand for an ever-narrowing pool of ‘celebrity arbitrators’ (usually with an extensive background in corporate law) creates something of an arms race when appointing a tribunal. Both dynamics create a climate in which an arbitral tribunal increasingly resembles the court room to which it was meant to provide an alternative.

This perceived convergence between arbitration and litigation has been one of the drivers of increasing interest in mediation, particularly for resolving international commercial disputes. As discussed earlier in this report, the signing of the Singapore Mediation Convention in August 2019 symbolised the appetite for this new approach. It is yet to be seen whether this marks a revolutionary change in the way international commercial disputes are dealt with, but the overall trend it encapsulates is clear – many parties feel arbitration is becoming indistinguishable from litigation in too many respects.

[10] White & Case, International Arbitration Survey: The Evolution of International Arbitration, 2018

7.2 Mediation and other forms of ADR: lawyers as gatekeepers?

Given the principles of conciliation and consensus-building that underpin mediation, it's reasonable to expect that lawyers would be less dominant than in arbitration (where the ability to come to a binding decision based on the legal merits of a case is paramount). However, this is not the case, and in the UK mediation remains dominated by people with backgrounds in corporate law[11]. It should be emphasized that both practicing and former lawyers can of course make excellent mediators. However, the implications of lawyer dominance for a mechanism that was originally intended to avoid the need for litigation need to be considered very carefully.

If mediation becomes overly-legalized, there is a real risk of it losing its most compelling feature – the preservation of commercial relationships. Litigation is typically an adversarial process to which mediation is meant to provide an antidote; if most mediators have cut their teeth as lawyers then mediation may lose its appeal as an alternative to court. Additionally, if the lines between mediation and litigation become blurred, there will always be a temptation to use mediation as a tactic to 'smoke out' the other party's arguments before reverting to arbitration or litigation, rather than as a good faith endeavor to find a mutually beneficial outcome.

During their time in Singapore, the MPs heard how the Singapore International Mediation Centre and the Singapore Mediation Centre select from non-lawyers when appointing mediators. In the UK, the construction and infrastructure sectors already have long understood the value of having industry experts deal with disputes as opposed to simply bringing in the lawyers (a point set out clearly in chapter 6 of this report). This is one reason why the construction industry has pioneered many dispute innovations (for example in the development of adjudication). There may be further lessons to learn from this sector in encouraging non-lawyers to practice as dispute professionals.

7.3 Opening up to non-lawyers

As we set out in section 5 of this report, if the UK is to retain and build on its position as a global disputes hub, our disputes framework must be fundamentally configured towards the needs of parties. A key theme of this report is that the mechanisms through which disputes are avoided, contained and resolved must be varied, flexible and organic, such that they maximise the potential for a constructive and sustainable outcome and foster a culture of dialogue and reciprocity as opposed to adversarialism.

It has been argued for decades that lawyers may not be best-placed to preserve a constructive commercial relationship between parties post-dispute, and that in certain scenarios, parties' needs may be better served by practitioners from outside the legal community[12]. Fundamentally, dispute practitioners from both legal and non-legal backgrounds should increasingly think outside of a strict legalistic paradigm and relentlessly focus on the fundamental objective: how to resolve disputes in the most effective, constructive way possible.

Policymakers and institutions in both the UK and Singapore should foster a paradigm shift whereby disputes are not viewed solely through a legalistic lens. In part, this will be achieved through the pursuit of the "ever wider and ever deeper" range of dispute resolution options, a recommendation set out in chapter 5. It also requires thinking about disputes in a way that goes beyond the legal conceptual framework and encompasses all aspects of commercial relationships. More people from a diverse range of backgrounds – both legal and non-legal – should be encouraged to pursue a career in dispute avoidance, management and resolution, bringing their expertise to bear in a way that allows parties to break out of traditional ways of operating and builds on the culture of innovation that has been the bedrock of non-court dispute mechanisms for centuries.

[11] For example, see M. Darbyshire, Mediation needs more women and fewer corporate lawyers, Financial Times: https://www.ft.com/content/6ca2d87a-9e64-11e9-9c06-a4640c9feebb (accessed 5th November 2019)

[12] See J.E. Meason and A.G. Smith, 'Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench' (1991) Northwestern Journal of International Law & Business 12, No. 1 pp. 26

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